No. 17967

UNITED STATES COURT of APPEALS

FOR THE NINTH CIRCUIT

PACIFIC SUPPLY COOPERATIVE, an Oregon Co-operative Corporation, Appellant,

v.

FARMERS UNION CENTRAL EXCHANGE, INCORPORATED, a Minnesota Corporation,

and

NATIONAL COOPERATIVES, INC., a District of Columbia Corporation, Appellees.

Appeal from the United States District Court
for the Eastern District of Washington,
Southern Division

PETITION FOR REHEARING

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PETITION FOR REHEARING

Appellant[1], pursuant to Rule 23 (28 U.S.C.A., 1962 Supp., p. 92), respectfully seeks a rehearing and correction of this Honorable Court's Opinion filed herein June 3, 1963, on the following grounds:

1. Summary disposition of the trademark issues was premature under the Rules, including Rules 6, 15, 16, 41 and 56 F.R.C.P., and so-called Handbook Procedure (25 F.R.D. 351-475), and appellant was not afforded proper notice or due process under U. S. Constitution Amendment V when the District Court terminated pretrial proceedings and summarily granted dismissal of claims before appellant had completed discovery in face of the order staying discovery (R. 570-572), and before any pretrial order had been formulated, completed or approved by counsel and the court

[1] As in the Briefs, appellant will be referred to herein as Pacific, and appellees as FUCE and National.

(R. 1451-1460), and before appellant had presented all of its proofs on the issue of exclusiveness.

2. The Opinion (pp. 3-12) errs when it accepts the incomplete Pretrial Order (R. 1451-1460) as "controlling." The stipulations are admittedly out of context (R. 9210-9214, 9325) and should be read with all the other evidence produced and to be produced at trial. Any pretrial order or stipulation can be changed at any time prior to completion of trial on the merits to promote justice and under the principle that a pretrial order is not an order until it is completed.

3. The Opinion also errs when it equates equal membership rights with contract rights, equitable rights of a proprietary nature, or rights growing out of exclusive use or estoppel — all questions of fact which should be resolved at trial (R. 339, 1707, 9140-9142, 9210-9214, 9239-9240, 9325).

4. **White Motor Co. v. U. S.**, 372 U.S. 253, 83 S. Ct. 696, 9 L. Ed. (2d) 738, decided after argument of the case at bar, construes Rule 56, F.R.C.P., as requiring a trial on the merits in cases wherein the facts and inferences reasonably to be drawn create real doubt. The record here creates real doubt as to the existence or nonexistence of exclusive trademark rights claimed by Pacific within its trade area, either owned by or granted to Pacific under express or implied agreements with National, or through long-time acquiescence of the parties creative of an estoppel precluding National and FUCE from infringing upon those claimed trademark rights in the trade area. Proofs show Pacific's user was substantially exclusive (15 U.S.C.A.

1052(f) as to each of the symbols, collective and ordinary, on various classes of goods, some sponsored by National and some by Pacific alone (R. 52-56, 283, 284-285, 287, 288, 292, 306-308, 350, 351, 352, 383, 384, 409-410, 750, 751, 752, 755, 756, 760-761, 765, 767, 768, 769, 771, 772, 997-1000, 1048, 1073, 1086, 1087, 1088, 1116, 1119-1120, 1126, 1163, 1164, 1706, 1707, 1708, 9140-9142, 9240, 9640-9641).

5. Fact questions remain for determination at trial "to determine the understanding of the parties" (p. 8, Opinion) as to amendments to the By-Laws and as to all of the conduct and practices of the parties before and after the effective date of the Lanham Act, July 5, 1947 (15 U.S.C.A. 1051, et seq.), including interpretation and construction of the By-Laws, the Caldwell Agreement (R. 296), Pacific's Membership Agreement, the nature of National and its relationship to the Regionals as beneficial owners of the marks or as exclusive licensees of National as registered owner of the marks "for the benefit of its members," to resolve the ambiguous documents and circumstances and to determine credibility of witnesses. (Cf. **Frito-Lay, Inc. v. Morton Foods, Inc.** (C.A. 10), 316 F. (2d) 298.)

6. A fact issue exists as to whether National and/or FUCE owe fiduciary obligations to Pacific due to the relationship of said parties, as in **Taussig v. Wellington Fund, Inc.,** 187 F. Supp. 179, 211-216, cert. den. 31 L.W. 3407 (6/10/63), particularly when it was admitted at pretrial that National cannot compete with Pacific under either ordinary or collective marks and FUCE cannot misappropriate Pacific's good will by

misuse of the marks through lack of control by National (R. 9077).

7. The Opinion misinterprets the Lanham Act (15 U.S.C.A. 1051 et seq.), particularly Sections 1052(f), 1065, 1115, 1127, and Section 49 of the Act (Note following 15 U.S.C.A. 1051). The Court erred in holding that the Lanham Act operated retroactively to destroy the vested trademark rights claimed by Pacific, when such an interpretation of the Act would violate the U. S. Constitution, Amendment V (Constitution U.S.C.A. p. 297) related to due process. A fact question is also presented under Section 49 which expressly preserves existing trademark rights generated by Pacific's user of the marks on goods within its claimed exclusive trade area prior to the effective date of the Act.

8. The Court erred in holding that the amended By-Laws granted only non-exclusive rights, and that the amendments to the By-Laws operated retroactively to destroy both contract and vested property rights in terms of good will generated through trademark uses by Pacific within its claimed exclusive trade area.

9. The Opinion erred in concluding that Pacific, by mere assertion of its claims to exclusive trademark rights within its trade area, was contesting the validity of the trademarks and the trademark registrations held by National "for the benefit of its members," prior to determination of the fact issue defining Pacific's trademark rights as those of a beneficial equitable owner (R. 1073, 1086, 1087, 1707, 1708, 7979) or as those of an exclusive licensee (R. 52-55).

10. Dismissal of the case as to National on the basis of insufficiency of the third party complaint was unjustified in the light of principles of **Foman v. Davis,** 371 U.S. 178, 83 S. Ct. 277, 9 L. Ed. (2d) 222.

11. The Opinion erred by finding Pacific is estopped by membership in National and by permitting National to register the marks, contrary to **Huber Baking Co. v. Stroehmann Bros. Baking Co.,** (C.A. 2), 252 F. (2d) 945, cert. den. 358 U.S. 829, 3 L. Ed. (2d) 69, and by failing to allow a trial on the question of estoppel in favor of or against Pacific growing out of conduct of the parties (R. 409-410).

12. The Opinion fails to adopt and follow the Washington law which holds an implied in fact contract based upon manifestations of the parties becomes a fact question, as recently determined by this Court in **Osborne v. Boeing Aeroplane Company** (C.A. 9), 309 F. (2d) 99 (1962).

A rehearing should be granted en banc or before the panel which rendered the Opinion herein[2].

Respectfully submitted,
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(2) All counsel for appellant desire that this Record shall reflect their sincere belief that the language on pages 2 and 3 of the Opinion, criticizing the presentation of appellant in its Briefs, should be moderated for the reason that counsel had no intention of violating any Rule of this Court nor any Canon. Counsel humbly express regret that any deficiencies appear in the Briefs.

CERTIFICATE OF COUNSEL

We hereby certify that in our judgment as counsel for appellant this Petition for Rehearing is well founded and that it is not interposed for delay.

Cameron Sherwood
Robert A. Comfort